Nos. 13-56706, 13-56755

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEJANDRO RODRIGUEZ, ET AL.
Petitioners – Appellees – Cross-Appellants,

v.

DAVID MARIN, ET AL.,
Respondents – Appellants – Cross-Appellees.

On Appeal from the United States District Court
for the Central District of California, No. 2:07-cv-3239-TJH-RNB
Honorable Terry J. Hatter, Judge

BRIEF FOR THE STATES OF CALIFORNIA, CONNECTICUT, MAINE, MASSACHUSETTS, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS – APPELLEES – CROSS-APPELLANTS

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INTERESTS OF AMICI

The States of California, Connecticut, Maine, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington and the District of Columbia submit this brief in support of the principle that if the federal government wishes to detain an individual for an extended period during the course of removal proceedings, it must justify that decision to a neutral arbiter, on individualized grounds and subject to appropriate periodic review. Because the statutes at issue here require or authorize the federal Executive to confine individuals for prolonged periods without providing these basic safeguards, they fail to comport with the Constitution's fundamental command that "[n]o person shall . . . be deprived of . . . liberty . . . without due process of law." U.S. Const. amend. V.[1]

The amici States have a strong interest in ensuring that non-citizens who seek to establish a legal right to remain in the United States and who pose no demonstrable danger to society or risk of flight are not unnecessarily subjected to prolonged detention while that issue is resolved. California alone is home to nearly 25% of the United States' foreign-born population, including 25% of all

[1] Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and this Court's April 12, 2018 order directing the parties and amici to file supplemental briefs.

legal permanent residents and 21% of undocumented immigrants.[2] Together, the amici States and the District of Columbia are home to nearly 18.5 million immigrants, or more than 42% of the Nation's total immigrant population.

As has been true throughout our Nation's history, the vast majority of these individuals pose no threat. On the contrary, many are integral members of our communities who contribute to our economies and civil societies. While the amici States support the lawful detention of demonstrably dangerous individuals, many of those facing removal pose no such concern. And federal statutes or policies that proceed on unjustifiably broad categorical grounds, resulting in needless detentions, cause real harm—not only to the individuals detained but to their families, their employers or employees, their co-workers, their communities, and their States.

[2] Gustavo López & Jynnah Radford, Pew Research Ctr., *Statistical Portrait of the Foreign-Born Population in the United States* (May 3, 2017), http://www.pewhispanic.org/2017/05/03/facts-on-u-s-immigrants-current-data/; Bryan Baker & Nancy Rytina, Dept. of Homeland Security, Office of Immigration Statistics, *Estimates of the Lawful Permanent Resident Population in the United States: January 2013* at 4 (Sep. 2014), https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202013.pdf; Pew Research Ctr., *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions* (Nov. 3, 2016), http://www.pewhispanic.org/interactives/unauthorized-trends/.

SUMMARY OF ARGUMENT

The federal statutes at issue in this case result in the prolonged detention of thousands of people every year. While some of these individuals are dangerous or pose a genuine risk of flight, most do not. Indeed, many have lived here for decades and have spouses, children, or other close relatives who are U.S. citizens or permanent residents. They work and run businesses, support families, and pay state and federal taxes. Many have no criminal record, and many others have been convicted of only minor, non-violent offenses. All are seeking to establish, through legal proceedings, that they have a right to remain in the United States. Detaining individuals such as these for extended periods while those proceedings remain pending can be devastating for the detainees, their families, and their communities.

Sometimes it is necessary to impose these costs. As the Supreme Court has made clear, however, "[i]n our society liberty is the norm." *United States v. Salerno*, 481 U.S. 739, 755 (1987). In other contexts involving civil detention—which are very familiar to the States—the courts have repeatedly held that government authorities may not deprive an individual of his or her liberty for any extended period without first convincing a neutral arbiter that there is an adequate justification for the detention, and then providing additional procedural protections such as periodic review. These are routine and essential requirements of due

process, designed to protect both individuals and our society from the arbitrary or abusive use of executive power. They apply even in circumstances where the case for detention can be quite strong. Similar safeguards are surely appropriate here. Indeed, such protections are especially important when those detained belong to groups that are the subject of scapegoating and political attacks.

What due process requires can vary considerably depending on particular circumstances. Here, the basic measures sought by appellees would strike an appropriate balance between the interests of individuals and those of the federal government. Requiring that executive authorities bear the burden of justifying any prolonged detention to a neutral decision-maker, based on each detainee's individual circumstances, is a typical minimum of due process. Requiring the government to introduce evidence justifying prolonged detention, taking due account of the length of a proposed or actual detention, and providing a mechanism for periodic review of continued detention would all comport with the burdens that courts have typically imposed on state and federal authorities in the context of other civil detentions. And appellees have made clear that they do not oppose the appropriate use of other mechanisms, such as conditional or supervised release, to reduce the risk that some individuals might abscond or commit a crime before the resolution of removal proceedings.

However the precise balance may be struck in particular situations, the amici States urge this Court to make clear that non-citizens who are lawfully contesting efforts by the federal government to force their removal from this country are entitled to the same sort of fundamental procedural protections afforded to individuals threatened with civil detention in other contexts. Anything less creates too great a risk that the federal government will, in the name of upholding the Nation's immigration laws, itself violate one of "freedom's first principles"—the "freedom from arbitrary and unlawful restraint." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

ARGUMENT

DUE PROCESS REQUIRES SUBSTANTIAL PROCEDURAL PROTECTIONS WHEN THE FEDERAL GOVERNMENT SEEKS TO DETAIN INDIVIDUALS DURING REMOVAL PROCEEDINGS

"In our society liberty is the norm," with "carefully limited exception[s]." *Salerno*, 481 U.S. at 755. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Among "freedom's first principles," the "freedom from arbitrary and unlawful restraint" is "[c]hief." *Boumediene*, 553 U.S. at 797. Indeed, "the practice of arbitrary imprisonments, [has] been, in all ages," among "the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Hamilton). And that threat is at

its apex when the detention at issue concerns politically unpopular or marginalized groups. *See, e.g.*, *Boumediene*, 553 U.S. at 732.

In light of these concerns, the Supreme Court has consistently held that the Due Process Clause requires certain protections in various contexts in which government authorities seek to detain and confine individuals other than as punishment for a duly proven crime. *See, e.g.*, *Salerno*, 481 U.S. at 748-749. In doing so, it has always carefully balanced individual and governmental interests. *E.g.*, *id*. at 748-751. Here, the individual (and state) interests in avoiding unnecessary detention are very strong. The countervailing governmental interests supporting detention *in some cases* are likewise strong. In other contexts, familiar to the States, the courts have reconciled these interests by permitting extended "regulatory" detentions, *id*. at 746—but only where the detaining authority can make a sufficient affirmative showing that the deprivation of liberty is clearly justified in each particular case. That approach strikes an appropriate balance between individual and governmental interests, and it should apply here.

A. Unnecessary Detentions During Removal Proceedings Impose Substantial Individual and Public Harms

The statutes at issue in this case result in the prolonged detention of thousands of individuals every year. In many of these cases, there is no good basis for concluding that the individual involved is likely either to abscond or to create any danger to the community while removal proceedings remain pending. As this

Court previously held, most members of the class have "strong ties to this country: Many immigrated to the United States as children, obtained legal permanent resident status, and lived in this country for as long as twenty years before [federal authorities] initiated removal proceedings." *Rodriguez v. Robbins*, 804 F.3d 1060, 1072 (9th Cir. 2015) (*Rodriguez III*).

Many of these individuals are valuable members of our local, state, and national communities. They are employees and employers, family members and heads of household, caregivers, congregants, students, and active participants in a wide range of social organizations. Many are married to citizens or lawful permanent residents, have children born in this country, and hold steady jobs that provide for themselves and their families. *Rodriguez III*, 804 F.3d at 1072. A substantial portion of the class has no criminal history; and of those who have been convicted of a crime, more than half served a sentence of less than six months. *See* Appellees' Supp. Br. 5; *see also Rodriguez III*, 804 F.3d at 1072 ("To the extent class members have any criminal record . . . it is often limited to minor controlled substances offenses."). Moreover, all class members involved in this appeal have sought to demonstrate or secure a legal entitlement to remain in the United States. And a significant number have been successful in that effort. *See* ER 721 Tbl.34, ER 730 Tbl.38 (71% of respondent class members sought relief from removal, and one-third of those who did were successful); *see also* Appellees' Supp. Br. 5

(nearly two-thirds of Arriving Subclass members and two-fifths of Mandatory Subclass members received favorable decisions in removal proceedings).

Individuals facing potential removal often play an important role in our economies. Undocumented immigrants, for example, account for approximately $181 billion of California's gross domestic product each year.[3] Non-citizens also make up a substantial portion of the workforce in our States in key job sectors such as agriculture, information technology, and high-tech manufacturing.[4] And they tend to complement, rather than compete with, non-immigrant employees, filling jobs that other workers often decline to take.[5] They also contribute substantially to

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[3] California Immigrant Policy Ctr., *Resilience in an Age of Inequality: Immigrant Contributions to California* at 3 (Jan. 23, 2017), *available at* https://www.scribd.com/document/337336889/Resilience-In-An-Age-of-Inequality-Immigrant-Contributions-Report-2017-edition*; see generally* Jacqueline Varas, Am. Action Forum, *How Immigration Helps U.S. Workers and the Economy* **(**Mar. 20, 2017), https://www.americanactionforum.org/insight/immigration-helps-u-s-workers-economy/.

[4] Audrey Singer, Brookings Inst., *Immigrant Workers in the U.S. Labor Force* (Mar. 15, 2012), https://www.brookings.edu/research/immigrant-workers-in-the-u-s-labor-force/.

[5] *ICE Worksite Enforcement – Up to the Job?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 101-112 (2011) (testimony of Cato Institute scholar Daniel Griswold); Kenneth Megan, Bipartisan Policy Ctr., *Immigration and the Labor Force* (Aug. 25, 2015), https://bipartisanpolicy.org/blog/immigration-and-the-labor-force/ (employment data show that high levels of immigration do not lead to lower employment among native-born Americans); *cf.* Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, 116 J. Pol. Econ. 381, 414 (June 2008).

state and local coffers by paying property, sales, and income taxes.[6] Indeed, undocumented immigrants alone account for approximately $11.64 billion in state and local taxes each year nationwide.[7]

Far from seeking to promote or assist in their removal, many States have taken a range of actions to foster the integration of immigrants into local communities and to safeguard their legal rights. California's public universities, for example, charge in-state tuition and provide financial aid to non-citizen students with significant ties to the State, regardless of their current status under federal immigration law. Cal. Educ. Code §§ 66021.6, 68130.5, 68130.7, 70030-70039. California adopted these measures because they benefit both the student and the State: by making college affordable, these fair tuition policies "increase[] the [S]tate's collective productivity and economic growth." Cal. Stats. 2001, ch. 814, § 1(a)(3). Washington's public universities likewise permit undocumented students with substantial connections to the State to pay in-state tuition. Wash. Rev. Code § 28B.15.012(2)(e); *see also* N.Y. Educ. Law § 355(2)(h)(8) (extending in-state tuition to certain undocumented students). California also allows individuals who are not lawfully present in this country to obtain driver's licenses,

[6] Lisa Christensen Gee et al., The Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* at 2 (February 2016), http://www.itep.org/pdf/immigration2016.pdf.

[7] *Id.* at 1.

based on the Legislature's finding that this measure improves road safety. Cal. Stats. 2013, ch. 524, § 1; *see also* Cal. Veh. Code § 12801.9. In addition, California has provided funds to pay for legal services for unaccompanied minors in federal removal proceedings, in an effort to ensure that the legal process they receive is fair. Cal. Welf. & Inst. Code § 13300. And New York's labor protections extend to undocumented workers. *See Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 362 (2006).[8]

Because so many non-citizens create value—not danger—in our communities, prolonged detention while they await the resolution of removal proceedings in which they seek to establish a right to remain in the United States will often burden both individuals and States in ways that are unjustified and substantial. From a public perspective, removing individuals from productive work or social engagement is doubly costly: Detention is not only expensive, but forces idleness. It can cause detainees to lose their jobs or their homes—consequences that are especially harsh for those who return to their communities after obtaining a favorable result in removal proceedings. It also puts a double strain on social

[8] *See also* Cal. Bus. & Prof. Code § 135.5 (state licensing boards may not deny professional licenses on account of citizenship or immigration status); Cal. Welf. & Inst. Code § 14007.8 (extending California's Medicaid program to undocumented minors).

resources by reducing state and federal tax receipts while increasing the demand for public support for those who are financially dependent on detainees.

Most significantly, prolonged detention imposes great human costs. Roughly one in five undocumented immigrants is married to a U.S. citizen or legal permanent resident.[9] And nearly half of all undocumented immigrants are parents of minor children who live in this country.[10] Approximately 5.5 million children, including 4.5 million U.S. citizens, have at least one parent who is an undocumented immigrant.[11] Similarly, many of the 13.1 million legal permanent residents who live in the United States, and who may become subject to removal proceedings for a variety of reasons, have family ties to this country.[12] Detention

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[9] Ctr. for Am. Progress, *Facts on Immigration Today* (Oct. 23, 2014), https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/.

[10] *Id.*

[11] Pew Research Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010* at 13 (Feb. 1, 2011), http://www.pewhispanic.org/files/reports/133.pdf; Silva Mathema, Ctr. American Progress, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants* at 1 (Mar. 16, 2017), https://dornsife.usc.edu/assets/sites/731/docs/KeepFamiliesTogether-brief.pdf (similar).

[12] Jie Zong & Jeanne Batalova, Migration Policy Inst., *Green-Card Holders and Legal Immigration to the United States* (Oct. 1, 2015), http://www.migrationpolicy.org/article/green-card-holders-and-legal-immigration-united-states (66% of immigrants who obtained legal permanent resident status in 2013 did so on the basis of a family relationship).

of any non-citizen for prolonged (or even simply uncertain) periods can throw the individual's family into economic disarray: without the detainee's income, the family may be unable to afford groceries or be forced into homelessness.[13] Detention of parents can have particularly harsh consequences for their children: some struggle in school, and others may be forced into foster care.[14] The latter result can prove especially costly to the States, which spend approximately $26,000 per year on each foster child.[15] Prolonged detention also disrupts some of society's most important relationships by separating spouses from each other and parents from children. And those separations can have long-lasting consequences.

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[13] Ajay Chaudry et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* at 29-33 (Feb. 2010), https://www.urban.org/research/publication/facing-our-future/view/full_report; *see also* Jens Hainmueller et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children's Mental Health*, 357 Science 1041, 1041 (Aug. 31, 2017) (concluding that "[p]arents' unauthorized status is [] a substantial barrier to normal child development and perpetuates health inequalities through the intergenerational transmission of disadvantage").

[14] Chaudry, *supra*, at 49-51; Susan D. Phillips, et. al., *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* at 22 (Jan. 2013), https://firstfocus.org/wp-content/uploads/2013/02/Children-in-Harms-Way.pdf.

[15] Nicholas Zill, Nat'l Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* at 3 (May 2011), http://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.

For example, children who are separated from their parents are more likely to suffer from anxiety, depression, and substance abuse.[16]

Because prolonged civil detentions during federal removal proceedings can impose such heavy personal and social costs, they demand equivalently weighty and individualized justifications.

B. Decisions from the Supreme Court and this Court Establish a Framework for Ensuring that Government Authorities Adequately Justify Civil Detentions

Both this Court and the Supreme Court have considered a variety of contexts in which government authorities seek to detain individuals for extended periods for reasons other than punishment for proven crimes.[17] In those contexts—very familiar to the States, which have the primary government role in most such situations—both courts have consistently made clear that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment for mental health treatment); *accord Jensen v. Lane County*, 312 F.3d

[16] Randy Capps et al., Migration Policy Inst., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature* at 7-11 (Sep. 2015), https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families.

[17] *Cf. Foucha*, 504 U.S. at 80 ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution.").

1145, 1146 (9th Cir. 2002) (civil commitment to a mental hospital imposes a "'massive curtailment of liberty'" and must therefore "comport with the requirements of due process").

Notably, these precedents address situations in which the case for detention can be very strong. When an individual has a severe mental illness, detention for treatment may be necessary to protect public safety—and, indeed, may be viewed as advancing the objective interests of the individual himself. Where a person is facing criminal prosecution for a serious crime, the public interests in community safety and an effective judicial process may again weigh heavily in favor of detention pending a full trial. Nonetheless, courts have narrowly confined the circumstances under which a State may detain such individuals for more than a few days without individualized review by a neutral arbiter.

As to civil commitment for the mentally ill, for example, in our society a State may not "lock[] a person up against his will and keep[] him indefinitely" without affirmatively demonstrating, to a neutral decision-maker, not only that the individual is mentally ill but that detention is necessary to avoid a risk of physical harm to the detainee or others. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *see also Jensen*, 312 F.3d at 1147 ("In general, due process precludes the involuntary hospitalization of a person who is not both mentally ill and a danger to one's self or others."). Likewise, if a criminal defendant is found not guilty by

reason of insanity, the government may detain the individual for supervision and treatment only so long as it can show that he remains both mentally ill and personally dangerous—even if the crime was serious or violent. *See Foucha*, 504 U.S. at 77-78. And if a defendant is found incompetent even to stand trial, the State still may not detain him, absent separate civil commitment proceedings, for more "than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see also United States v. Strong*, 489 F.3d 1055, 1061 (9th Cir. 2007) (federal statute that allows detention of individual found incompetent to stand trial held constitutional because it "echoed *Jackson*'s language").

These due process protections are not without cost. Providing individualized consideration and neutral adjudication in thousands of cases every year can be time-consuming and expensive. *Cf. Boumediene*, 553 U.S. at 769 ("Compliance with any judicial process requires some incremental expenditure of resources."). As this Court has noted, however, authorities may develop procedures that "can be implemented without an undue burden on state resources," so long as those procedures comport with the basic requirements of due process. *E.g.*, *Doe v. Gallinot*, 657 F.2d 1017, 1023-1024 (9th Cir. 1981) (State need only provide an "independent evaluation, by a neutral decisionmaker" to detain the gravely

mentally ill for up to 14 days). In this particular case, it appears that the cost of detaining class members is significantly greater than the costs associated with holding bond hearings and monitoring immigrants once released. *See* ER 693 Tbl.18.

Requiring the government to justify any prolonged detention also no doubt results in some harms that might have been prevented if the government could detain individuals based on less or different evidence, rely on stereotypes and categorical assumptions, or continue detentions for prolonged periods without periodic review by a neutral arbiter. But courts have consistently balanced the interests involved in these situations in a manner that favors the basic principle of freedom from restraint. Although that principle imposes burdens on public authorities, the amici States recognize that it also protects the liberty of our people. And we strongly endorse the courts' continuing vigilance to ensure that the Constitution likewise adequately restrains prolonged detentions of non-citizens by federal immigration authorities. This is especially important at a time when non-citizens have become the repeated targets of open fear-mongering and political attacks. "Mere public intolerance or animosity" towards "those whose ways are different . . . cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor*, 422 U.S. at 575.

C. Equivalent Protections Should Apply Where the Federal Government Seeks to Detain Individuals During Removal Proceedings

Both this Court and the Supreme Court have recognized that cases dealing with other types of civil detention are relevant in the immigration context. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017). Rejecting a broad assertion by the federal government that "alien status itself [could] justify indefinite detention" of a non-citizen already held to be removable, the Supreme Court emphasized that it has previously countenanced civil detention only "in certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690, 692 (citation omitted; quoting *Foucha*, 504 U.S. at 80, and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). And this Court has repeatedly noted that the "prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." *Rodriguez v. Robbins*, 715 F.3d 1127, 1137 (9th Cir. 2013) (*Rodriguez II*) (quoting *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 951 (9th Cir. 2008)).

This Court should now make clear what both precedent and first principles suggest: that the Constitution prevents federal authorities from detaining non-

citizens for prolonged periods during removal proceedings without adequate procedures and justifications. *See Rodriguez II*, 715 F.3d at 1135-1136. No doubt the federal government will be able to show that some individuals must be detained because they pose a danger to the community or a risk of flight. It should not, however, be permitted to detain individual non-citizens for prolonged periods on the basis of group classifications, assumptions, or stereotypes. The personal, community, and public interests in avoiding lengthy and unnecessary immigration-related detentions warrant the same sort of procedural protections that our society provides for other civil detainees.

What due process requires varies depending on the circumstances. Here, the protections sought by appellees would strike an appropriate balance between their liberty interests and the federal government's countervailing interests in public safety and preventing flight. Indeed, they largely resemble the protections that the States already provide most other civil detainees.

At a minimum, due process guarantees the right to an individualized assessment, before a neutral adjudicator, of the asserted need for the detention. *See, e.g.*, *Foucha*, 504 U.S. at 77-83 (emphasizing need for individualized showing of proper, current grounds for detention).[18] In these proceedings, the detaining

[18] *See also Casas-Castrillon*, 535 F.3d at 951 (construing 8 U.S.C. § 1226(a) as requiring the federal government to provide a non-citizen who has been detained

authority normally has the burden of justifying any extended detention, which it typically must carry by providing clear and convincing evidence of a current basis and need for the detention. *See Addington*, 441 U.S. at 433 (mental illness); *Foucha*, 504 U.S. at 86 (continued detention based only on asserted danger to community); *Salerno*, 481 U.S. at 751 (describing statutory protections for pretrial arrestees).[19]

In addition, both this Court and the Supreme Court have considered the length of detention a highly relevant factor in the due process analysis. As the "'period of confinement grows,'" the private interests affected by the detention become "more substantial," and "greater procedural safeguards are therefore required." *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (construing 8 U.S.C. § 1231(a)(6)); *see also Salerno* 481 U.S. at 747 (pretrial detention permissible in part because of "stringent time limitations of the Speedy Trial Act"); *Demore v. Kim*, 538 U.S. 510, 513, 529-530 (2003) (detention permissible in part because it typically lasted for only a "brief period"). Where detention is or may be prolonged, the Supreme Court has also looked to the availability of periodic review

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for a prolonged period with an "individualized determination of his dangerousness or flight risk" to avoid constitutional concerns).

[19] *See also Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011) (construing 8 U.S.C. § 1226(a) in light of *Addington* and *Foucha* to require the federal government to justify detention by proving by clear and convincing evidence that an immigrant is a flight risk or a danger to the community).

to ensure that the grounds asserted by the government to justify the detention remain current and valid. *See Hendricks*, 521 U.S. at 363-364 (post-sentence detention of sexually violent criminals allowed in part because of required annual reassessment); *Foucha*, 504 U.S. at 77-83 (need for new showing when conditions or grounds for detention change); *cf. Jackson*, 406 U.S. at 738 (detention on ground of incompetence to stand trial "must be justified by progress toward" regaining competency; otherwise, government must establish new ground for continued detention).

Appellees seek essentially the same basic protections. The federal government has responded that special features of the immigration context justify providing less protection for non-citizens in removal proceedings. *See, e.g.*, U.S. Supp. Br. 31-32, 56. The amici States offer the perspective of coordinate governments that also routinely face the need to balance considerations of personal liberty against those of public safety and orderly legal procedure. In addition, as discussed, many of the non-citizens whose protection is at issue are also state residents and members of our communities. From these perspectives, the federal government's arguments are unpersuasive.

Federal primacy in immigration matters, for example, does not justify denying non-citizen state residents basic due process protections. Even in this area, the Supreme Court has made clear that exercises of federal power are "subject to

important constitutional limitations." *Zadvydas*, 533 U.S. at 695.[20] And in this circuit, it is "well-settled" that the Due Process Clause applies in the "context of immigration detention." *Hernandez*, 872 F.3d at 990. These basic constitutional protections should include the requirement of individualized determinations of flight risk or dangerousness to justify prolonged detention pending the completion of removal proceedings.

Nor does requiring such an individualized assessment impinge on federal authority to control admission into the United States. *See* U.S. Supp. Br. 31-32. Allowing non-citizens who do not pose demonstrable risks to continue their ordinary activities while the government seeks to establish that they should be deported—and they seek to establish that they should not—will not change the legal standards governing that question, or confer any otherwise unavailable right to enter or remain in the United States.[21] Similarly, providing standard due process protections does not require allowing individuals subject to removal proceedings to

[20] *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) ("[T]he most exacting" void-for-vagueness standard "appl[ies] in removal cases"); *INS v. Chadha*, 462 U.S. 919, 940-942 (1983) (Congress must choose a "constitutionally permissible means of implementing" its authority over immigration law).

[21] It is worth recalling that a significant number of individuals who are placed in removal proceedings do establish a right to remain. For example, roughly one-third of those in the class certified in this case have prevailed in their removal proceedings. *See* ER 721 Tbl.34, ER 730 Tbl.38; *see also* Appellees' Supp. Br. 5 (nearly two-thirds of Arriving Subclass members and two-fifths of Mandatory Subclass members prevail at removal proceedings).

live "at large." *See* U.S. Supp. Br. 33. Respondents have made clear that they do not contest the government's ability to subject them, during such proceedings, to appropriate monitoring short of physical detention. *See* Appellees' Supp. Br. 55; *see also Zadvydas*, 533 U.S. at 695-696.

Finally, that some persons who are released may then abscond or commit crimes does not justify detaining all non-citizens based on broad categorical judgments, without an individualized demonstration of substantial risk. *See* U.S. Supp. Br. 46-47. The amici States of course share concerns about public safety and improper flight—in this context as in others. In case after case, however, courts have made clear that categorical fears are not a constitutionally sufficient basis for extended detentions. Indeed, a central principle of the civil detention cases is that a decision so profoundly restricting personal liberty must be based on an individualized demonstration of real need—not on group stereotypes or unsubstantiated fears. *Compare Korematsu v. United States*, 323 U.S. 214, 218-219 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). This is the standard our society applies in the face of risks potentially posed by those charged with but not yet convicted of serious crimes, and by those whose mental illness could make them dangerous or has even already led to criminal acts. *See, e.g.*, *Salerno*, 481 U.S. at 750 (arrestees); *O'Connor*, 422 U.S. at 574 (mentally ill); *Jackson*, 406 U.S. at 738 (individual incompetent to stand trial); *Foucha*, 504 U.S.

at 83 (individual previously acquitted based on legal insanity). There is no good reason for allowing the federal government to apply a lower standard in making detention decisions concerning non-citizens who are potentially subject to removal.

The procedures required by due process can vary considerably depending on particular circumstances. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). In a few situations, for example, there might be genuine questions of "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. But those situations are the exception, not the norm, and they are not involved here.[22] It is vital that vague invocations of phrases such as "national security" or "terrorism" not be allowed to justify erosion of fundamental liberties such as the freedom from physical restraint. Speaking as governments themselves, the amici States believe that the basic procedural protections sought by appellees will, in most cases, strike an appropriate balance between individual liberty interests and the federal government's need to detain non-citizens in removal proceedings who present a genuine risk of flight or community danger. And any

[22] For instance, this case does not involve detention of suspected terrorists under special statutory provisions. *See Rodriguez III*, 804 F.3d at 1066; *see also* 8 U.S.C. §§ 1226a, 1537.

substantially lower constitutional standard risks empowering federal authorities to subject non-citizens to unjustified or even arbitrary detentions.

CONCLUSION

This Court should hold that the Constitution requires appropriate procedural protections when the federal government seeks to detain individuals for prolonged periods during removal proceedings.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with this Court's April 12, 2018 supplemental briefing order because it is 24 pages long, excluding the items listed in Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with typeface requirements of Rule 29(a)(4) and 32(a)(5) because it has been prepared in 14-point Times New Roman font.

July 27, 2018 *s/ Samuel P. Siegel*
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CERTIFICATE OF SERVICE

I certify that on July 27, 2018, the foregoing **BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, MAINE, MASSACHUSETTS, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS – APPELLEES – CROSS-APPELLANTS** was served electronically via the Court's CM/ECF system upon all counsel of record.

July 27, 2018 *s/ Samuel P. Siegel*
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